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IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. **75 740**

JAMES S. GRAHAM,
Appellant,

VS.

MARCH FONG EU, Secretary of State,
and REPUBLICAN STATE CENTRAL COMMITTEE
OF CALIFORNIA,
Appellees.

On Appeal from the United States District Court
for the Northern District of California

JURISDICTIONAL STATEMENT
and
MOTION FOR EXPEDITED HEARING

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the District Court has been certified for publication but has not yet been reported. It is set forth herein as Appendix A to this jurisdictional statement.

JURISDICTION

The opinion of the three-judge District Court was filed on July 28, 1975. The judgment in the case was filed September 9, 1975. It is set forth herein as Appendix B. Appellant filed his Notice of Appeal on September 26, 1975. This is shown in Appendix C. Jurisdiction to review the judgment of the three-judge District Court is conferred on this Court by 28 U.S.C. §§ 1253 and 2101(b). See *Dunn v. Blumstein*, 405 U.S. 330, 332-333 (1972).

QUESTIONS PRESENTED

1. Whether the use in California of the winner-take-all method of selecting delegates to the Republican National Convention, which is a method used in only three other jurisdictions, "operates to dilute or cancel the voting strength of . . . political elements" in violation of *Whitcomb v. Chavis*, 403 U.S. 124, 144 (1971).

2. Whether the District Court below could disregard express language in *Cousins v. Wigoda* 419 U.S. 477, 489-490 (1975), indicating that the relevant constituency for national convention delegate selection is the nation rather than the state.

3. Whether the winner-take-all primary violates constitutional constraints by operating "systematically to prevent ultimate effective majority rule." *Lucas v. Colorado General Assembly*, 377 U.S. 713, 754 (1964) (Stewart, J., dissenting).

PROCEEDINGS BELOW

On March 1, 1974 Appellant filed his Complaint in the U. S. District Court for the Northern District of California seeking a declaratory judgment regarding the constitutional validity of Cal. Elec. Code § 6201 and a permanent prohibitory injunction preventing future enforcement of that provision. It is under this statute that delegates from California to the Republican National Convention are elected as a slate committed to the candidacy of the plurality winner of the statewide primary. This is more popularly known as the winner-take-all primary. On April 8, 1974 a three-judge District Court was ordered convened to hear the case. On September 18, 1974 a Motion to Strike the Complaint filed by Defendants was denied. On January 17, 1975 a Motion to Strike Objections to Requests for Admissions filed by Appellant was granted in part and denied in part. Subsequently the Defendants admitted that no American state chooses its state legislatures on a statewide winner-take-all basis at the present time and that all members of the United States House of Representatives are chosen from single-member districts at the present time. At the same time, however, the Defendants stood by their other responses that they were unable to admit or deny certain requests related to the impact of the unit rule on political stability, voters and candidates on the ground that they lacked sufficient information or knowledge to respond and that such information could not be obtained with reasonable inquiry.

On February 26, 1975 a hearing on the merits of the case was held. At the time of the hearing Appel-

lant submitted his own affidavit establishing his standing to sue, an affidavit of Congressman Paul N. McCloskey, Jr. regarding the effect of the winner-take-all rule on presidential candidates, and an affidavit by Dr. Daniel A. Mazmanian of Pomona College and the Brookings Institution regarding the historical origins of the winner-take-all primary and its impact upon voters, candidates and political stability. The Defendants submitted an affidavit by a party official and certified copies of the primary election returns from 1912 to 1972.

On July 28, 1975 the District Court filed its opinion upholding the winner-take-all primary.

**THE QUESTIONS RAISED BY THIS APPEAL
ARE SUBSTANTIAL**

I. THE BUILT-IN BIAS OF THE WINNER-TAKE-ALL PRIMARY BOTH DILUTES AND CANCELS THE VOTING STRENGTH OF DISCERNIBLE VOTING ELEMENTS; THE DISTRICT COURT ERRED IN FINDING THE ELECTION OF DELEGATES STATEWIDE CONSTITUTED A PERMISSIBLE MULTI-MEMBER DISTRICT.

The central abuse of the winner-take-all primary is the failure of the State to allocate its delegates to districts for their election. It is well established that the "achieving of fair and effective representation is concededly the basic aim of legislative apportionment." *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964). Quite implicit as a corollary to this principle is the concept that some form of districting is necessary in order to obtain fair and effective representation. This propo-

sition was recently indicated in *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973): "The very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats."

In the District Court the Appellant argued that the election of delegates at large was unconstitutional since it "operate[s] to dilute or cancel the voting strength of . . . political elements" in violation of *Whitcomb v. Chavis*, 403 U.S. 124, 144 (1971). In rejecting this claim the District Court concluded that insufficient proof of cancellation was offered. In so ruling the District Court departed substantially and erroneously from the controlling principles set forth in *Whitcomb*.

Most assuredly the three basic criteria necessary to a showing of invalidity were established, to wit, that (1) "the district is large and elects a substantial proportion of the seats in either house," (2) that "it is multi-member for both houses of the legislature," and (3) that "it lacks provision for at-large candidates running from particular geographical sub-districts." *Id.* at 143-144. *Chapman v. Meier*, 420 U.S. 1, 17 (1975); *Burns v. Richardson*, 384 U.S. 73, 88 (1966). The district in question herein constitutes the largest demographic and geographic multi-member district in the United States. It is substantially larger than the district involved in *Whitcomb* where eight senators and fifteen assemblymen from a single county were involved. *Id.* at 127-28. Here the Court is con-

cerned with the election of 167 delegates to the 1976 Republican National Convention selected from an entire State. Moreover, no provision requires delegates to reside in sub-districts nor is there an additional forum where the unit rule does not apply.

Beyond these basic considerations, however, Appellant carried his burden in every other critical respect. In *Whitcomb* this Court considered important the inability of the challengers to show (1) "that the party failed to slate candidates satisfactory to the ghetto," (2) that the complainants were not "equally represented on those occasions when legislative candidates were chosen," (3) that "any legislative skirmish affecting the State . . . or Marion County in particular would have come out different [had the] County been subdistricted," (4) that the representation "in particular legislative situations would . . . have been any different if the [representatives] had been chosen from single-member districts," (5) that there was "recurring poor performance by Marion County's delegation with respect to the [complainants]." *Id.* at 152, 149, 148 and 155. In contrast, Appellant herein demonstrated each of these elements. Since delegates for the candidate winning the primary are committed by Cal. Elec. Code §6057(g) to vote indefinitely for the winning candidate, the voters for non-plurality candidates secure no representation whatever at the critical nomination stage of the intraparty process. Furthermore, Appellant demonstrated that had delegates been elected from districts the outcome would have been different. It was shown that in the Re-

publican Primary of 1964 Governor Rockefeller was the winner in forty-four (44) of the fifty-eight (58) counties in California, including virtually all of Northern California. Yet because of substantial victories in Los Angeles and Orange Counties Senator Goldwater managed to narrowly carry the whole state and thus the entire delegation. In further illustration, evidence was entered regarding the Democratic Primary of 1972 where Senator McGovern received 1,550,652 votes or 43.50% of the total, thereby leaving a majority of 56.50% of the voters unrepresented at the Convention. That evidence further indicated that had delegates been elected from districts Senator Humphrey would have gained substantial representation since he captured the plurality vote in Los Angeles and Orange Counties as well as six (6) other counties.

Indeed, not only would the outcome of the delegate elections in California have been different, the outcome of the respective party nominations might well have been different. It cannot be gainsaid that the California Primary victories of Senators Goldwater and McGovern were key to their nominations. *See* T. H. White, *The Making of the President 1972* 122 (1973).

In *Whitcomb* the Court concluded that the challengers had established their case only "mathematically" and that their claims of discrimination "remains a theoretical one." *Whitcomb v. Chavis, supra*, at 144-145 fn. 23. There was a further finding that the complainants "could fairly be said to be repre-

sented by the entire delegation" and that the minorities within the County had at least a "claim to the partial allegiance of [those] representatives." *Id.* at 153-54. Moreover, that "the interest[s] of ghetto residents in certain issues did not measurably differ from that of other voters" and that in certain "respects [the] assemblymen were satisfactorily representative of the ghetto." *Id.* at 155. In contrast, as indicated already, there was no evidence below to even remotely support such conclusions.

It is respectfully submitted that, notwithstanding contrary dicta, the considerations set forth above were essential to the disposition in *Whitcomb*. See *Id.* at 170 (Harlan, J., dissenting). Indeed, many of those factors were restated in the subsequent case of *White v. Regester*, 412 U.S. 755 (1973). There for the first time a multi-member district was invalidated on the ground of dilution of minority votes. In so ruling the Court found that the controlling political organization did not "exhibit good faith concern for the political . . . needs . . . of the Negro community . . . [and that] the black community ha[d] been effectively excluded from participation in the . . . primary . . . and was . . . generally not permitted to enter into the political process in a reliable and meaningful manner." *Id.* at 767. In short, the representation was "insufficiently responsive to [minority] interests." *Id.* at 769. More recently, these concerns were voiced in *Chapman v. Meier*, 420 U.S. 1, 16 (1975), where the Court indicated that sufficient evidence of dilution would be shown where there is "bloc voting by dele-

gates from a multi-member district . . . result[ing] in undue representation of residents of those districts relative to voters in single-member districts." Although differently phrased, these tests reaffirm the controlling principles set forth in *Whitcomb*, which were totally overlooked by the District Court. In summary, merely allowing voters to participate by casting a ballot is insufficient. More is required, specifically, extending non-plurality factions at least the *possibility* of obtaining delegate representation.

In *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), cert. granted sub. nom. *East Carroll Parish School Board v. Marshall*, 95 S.Ct. 2677 (1975), another indicia of voter dilution in multi-member district cases was identified. The Court of Appeals indicated that where the challenged district exists as a part of a legitimate articulated state policy favoring multi-member districts, the proof of dilution will be made more difficult. *Id.* at 1305. In California, however, the statutory and Constitutional policy *requires* single member districts for the election of all state senators, assemblymen and federal congressmen. Cal. Const. Art. IV, § 6; Cal. Elec. Code §§ 30000, 30100 and 30201 (West Supp. 1975). Similarly, the rules of the Republican Party nowhere expressly sanction the election of delegates by a statewide slate with the winner taking all. Although party rules expressly authorize the selection of delegates at large, there is no provision that expressly approves such selection on a slate basis. It is the slate basis, of course, which prohibits the voter from splitting his

vote among different factions and constitutes the essential built-in bias of the rule. It is equally true, however, that no party rule expressly prohibits winner-take-all. Nevertheless, under this further test the winner-take-all primary must be viewed with further doubt.

In the District Court Defendants observed that heretofore multi-member districts have been invalidated only where racial rather than political elements have been adversely affected. It is respectfully submitted, however, that the harms involved herein are of the very same type as those visited upon the complainants in *White v. Regester* and that to countenance such harms would in fact constitute a form of reverse discrimination. Furthermore, that the absence of racial factors in this case is more than set off by (1) the overwhelming geographic and demographic factors and (2) by the fact that the unit rule more completely distorts the popular will than was the case in *Whitcomb*. In *Whitcomb* the districting factor had impact only at the final stage of the primary and in the final election. Thus all voting elements had an equal voice at the actual stage of party nomination. Yet this is precisely what the unit rule prevents herein.

In general this Court has "underscored the danger of apportionment structures that contain built-in bias tending to favor particular . . . political interests." *Abate v. Mundt*, 403 U.S. 182, 185-186 (1971). With particular reference to multi-member districts this Court has indicated that such built-in bias will be

shown where there is "bloc voting [that] *diminishes* the opportunity of a *minority* party to win seats." *Burns v. Richardson*, 384 U.S. 73, 88 fn. 14 (1966) (emphasis added). In California, however, the bias is substantially greater for here the unit rule *compels* bloc voting and can *prevent* even a *majority* from winning seats. This is the major distinction between this case and *Whitcomb*. In the latter the failure of minorities to gain seats was only the coincidental result of the pre-existing voting patterns within the district. For split ticket voting could have resulted in minority party victories. As such, the inability of minorities to gain representation was more "a function of losing elections than of built-in bias." *Id.* at 153. In contrast, in the California primary the failure of non-plurality factions to gain representation results exclusively from the built-in bias of the unit rule which prohibits split ticket voting and which can operate "systematically to prevent ultimate effective majority rule." *Lucas v. Colorado General Assembly*, 377 U.S. 713, 754 (1964) (Stewart, J., dissenting).

II. THE ELECTION OF DELEGATES FROM CALIFORNIA IS A PART OF A NATIONAL PROCESS WITHIN WHICH THE RIGHT TO AN EFFECTIVE VOTE MUST BE PROTECTED AT ALL LEVELS.

It is precisely because the distortion of voter preferences which takes place under the unit rule occurs at the first tier of the delegate selection process that judicial intervention becomes imperative. For the

distortions that can take place at this level can result in what has been acknowledged to be unacceptable: the "frustration of the majority will through minority veto." *Reynolds v. Sims*, 377 U.S. 533, 576 (1964). The dangers that inhere were most cogently articulated by the late Professor Alexander Bickel, *Reform & Continuity* 54 (1971):

No doubt majority rule must obtain at final decision-making stages in our politics. But that very principle itself can be perverted by a too early insistence on it at preliminary decision-making stages. If at such preliminary stages in the delegate selection process successive minorities are allowed to prevail and to represent only themselves . . . then it is quite possible, it is in some circumstances likely, that the final majority of delegates which prevails at the convention will represent a minority, and not a majority, of the party voters in the country at large.

In response to this argument, the Defendants in the District Court argued that the California Primary is not a preliminary election but rather the final election phase for convention delegates. As such, they argued that the relevant constituency for the selection of delegates is the State. Further, since the State is the appropriate constituency then a winner-take-all principle may apply since the primary is both the first and final phase of the delegate selection process.

This reasoning should be totally rejected. It is entirely specious to conclude that delegate selection is a process ending at the State line. This was inferentially indicated in *Oregon v. Mitchell*, 400 U.S. 112,

134 (Opinion of Black, J.), 148 (Opinion of Douglas, J.) (1970). It was then clearly indicated in *Cousins v. Wigoda*, 419 U.S. 477, 489-90 (1975) (emphasis added):

Delegates perform a task of supreme importance to every citizen of the Nation regardless of their state of residence. The vital business of the Convention is the nomination of the Party's candidates for the offices of President and Vice President of the United States. To that end the state political parties are "affiliated with a national party through acceptance of the national call to send state delegates to the national convention." *Ray v. Blair*, 343 U.S. 214, 225 (1952). *The States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice Presidential candidates . . . a process which usually involves coalitions cutting across state lines. The Convention serves the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State.*

In the selection of presidential electors the Constitution in Article II fragments the selection of electors and *necessarily* defines the state as the appropriate geographic constituency. But in the delegate selection phase this does not *necessarily* follow. In this area the constituency can quite permissibly go beyond the boundaries of the state as, for example, through the use of regional primaries. See *Cousins v. Wigoda*, 419 U.S. 477, 490 fn. 9 (1975). This results from the fact that in delegate selection the state is allowed to act by the *national* political party with respect to the seat-

ing of delegates at its *national* convention for the selection of a presidential candidate whose constituency, if elected, is the *nation*. Thus while the District Court properly concluded, in footnote 32, that in the electoral college interstate distortions are an inevitable consequence of the constitutional decision to fragment the election process among the several states, it erred in failing to perceive that this is not an inevitable result in the nomination phases. Accordingly, because the state has been given a choice with respect to delegates, since substantial infringements on fundamental rights are involved "the State may not choose the way of greater interference." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

This analysis is strongly supported by the closely analogous case of *Gray v. Sanders*, 372 U.S. 368 (1963), which was dismissed by a footnote in the District Court. At issue there was the Georgia County unit system of counting votes in a statewide primary for governor and senator. Under that system candidates who received the highest number of votes in a county were granted the entire unit vote of that county. In the District Court the system was found defective only for the reason that unit votes were not allocated among the counties strictly according to population. On review, however, this Court held that the entire system, even if properly apportioned, would remain defective since it would still result in votes being "counted only for the purpose of being discarded." *Id.* at 381 fn. 12. Thus *Gray* was not an equal population case; rather the case primarily confronted

the issue of the qualitative aspects of intraparty representation.

In essence, *Gray* held that equal protection prohibits the use of vote cancellation devices at the *starting line* of the intraparty process. What *Gray* condemned was the discarding of votes at a "preliminary election that in fact determines the true weight a vote will have." *Id.* at 380. In so doing the Court reaffirmed that the "concept of political equality . . . extends to all phases of state elections." *Id.* See *Terry v. Adams*, 345 U.S. 461, 469-470 (1953). As such, the decision is more relevant than the holdings in *Whitcomb v. Chavis* and *Williams v. Virginia State Board of Elections* which both concerned dilution at the *final* stage of the electoral process.

Although the relevant constituency in *Gray* was the state, the principle would appear to have similar application here where the convention serves a "pervasive national interest" and acts on behalf of a constituency that "comprises to a certain degree the entire electorate." *Cousins v. Wigoda, supra*, at 490; *Bode v. National Democratic Party*, 452 F.2d 1302, 1306 (D.C. Cir. 1971). As such, since the unit rule in this action similarly operates as a built-in bias that awards representation to only one faction while automatically cancelling the votes of other factions within the constituency, it too must violate constitutional constraints. "[W]ithin a given constituency there can be room but for a single constitutional rule—one voter, one vote." *Gray v. Sanders, supra* at 382 (Stewart, J., concurring).

III. USE OF THE UNIT RULE IN THE ELECTORAL COLLEGE RESULTS FROM SPECIAL CONSTITUTIONAL PROVISIONS THAT DO NOT APPLY HEREIN; ANALOGIES BETWEEN THE ELECTORAL COLLEGE AND DELEGATE SELECTION ARE TOTALLY INAPPOSITE.

In upholding the validity of the California primary, the District Court relied heavily on the case of *Williams v. Virginia State Board of Elections*, 393 U.S. 320 (1969), *aff'g* 288 F.Supp. 622 (E.D. Va. 1968). In that case use of the winner-take-all rule in the Electoral College was summarily affirmed. Such reliance, however, was critically erroneous since the outcome in *Williams* was mandated by specific constitutional provisions that have no application whatever in the context of delegate selection.

In *Williams* the District Court concluded that the specific provisions of Article II, Section 1 constituted special authority for the unit rule. *Id.* at 626. Indeed, long ago it was held that the Article II power "leaves it to the legislatures *exclusively* to define the method" of selecting electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). More recently the Court stated that there "can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

Further support for the unit rule in the Electoral College was found under the Twelfth Amendment which provides that where no candidate receives a majority of the electoral vote, then the selection is to be made in the House of Representatives with each state delegation voting as a unit with one vote as

according to how the greatest number of representatives voted. The District Court in *Williams* inferred that if a unit rule was proper within the House of Representatives, a unit rule within the Electoral College was permissible. *Id.* at 626-27. Further reliance was placed on historical evidence suggesting that use of the unit rule in the Electoral College was anticipated by the draftsmen of Article II. *Id.* at 626 and 628.

By deriving support from the *Williams* decision, however, the District Court below erred in two significant respects. First, it failed to perceive that where a state acts under an express plenary grant of power from the Constitution, there is an "added presumption in favor of the validity of the state regulation." *California v. LaRue*, 409 U.S. 109, 118 (1972). Thus state action which might be invalid where the state acts from its general authority may be constitutional where enacted under an express constitutional authority. Or, stated differently, where the Constitution expressly enlarges the power of a state, the scope of judicial review is correspondingly reduced. With respect to the Article II power this position was articulated by Justices Stewart and White in *Williams v. Rhodes*, 393 U.S. 23, 50-51 (Stewart, J., dissenting), 61 (White, J., dissenting). Indeed, the doctrine may have gained subsequent acceptance from a majority of the Court in *Moore v. Ogilvie*, 394 U.S. 814 (1969). There a statute legislated under the Article II power was struck down without mention of strict review on a finding that it applied "a rigid, arbitrary formula." *Id.* at 818.

The second error of the District Court below was in holding that analogies could be drawn in any event between delegate selection and the Electoral College. In *Davis v. Mann*, 377 U.S. 678, 692 (1964), analogies between the College and state legislatures were rejected. In *Gray v. Sanders*, 372 U.S. 368, 377-78 (1963), a similar result was reached with respect to the election of statewide officers:

[T]he Electoral College was set up as a compromise to enable the formation of the Union among the several sovereign states . . . we think the analogies to the Electoral College to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the Electoral College in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a state in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued.

Moreover, the District Court below erred in ignoring historical materials showing that neither the draftsmen of Article II in 1787 nor the authors of the Twelfth Amendment in 1804 could have intended use of the unit rule with respect to presidential nominating conventions since the system of party nominations did not develop until some two decades later. See S. E. Morison, *The Oxford History of the American People* 309 (1965); R. Nichols, *The Invention of*

the American Political Parties 294 (1967). Additionally, there was further uncontested evidence to this effect that was admitted into the trial record. Affidavit of Dr. Daniel A. Mazmanian, pages 3-4. See also *Wigoda v. Cousins*, 342 F.Supp. 82, 86 (N.D. Ill. 1972). In light of all of the foregoing, the reliance of the District Court on analogies between delegate selection and the Electoral College and what is constitutionally permissible in the latter context would appear clearly erroneous.

IV. THE DISTRICT COURT ERRED IN FAILING TO APPLY STRICT SCRUTINY; YET EVEN UNDER MINIMAL REVIEW THE STATUTE AT ISSUE MUST FAIL.

It is clear from Footnote 30 that the District Court below did not test the winner-take-all rule by a standard of strict review. This result was apparently reached by reasoning that the case did not present claims of geographic discrimination or of discrimination against identifiable political groups. Both conclusions were incorrect.

First, the geographic discrimination which occurs under the unit rule arises in both an intrastate and interstate sense. Within California the failure of the state to district results in discernible geographic units being totally deprived of the representation they would otherwise receive by districting. It further arises vis a vis Republicans in other states who under party rules and statutes are permitted to select delegates through systems that avoid the structural defects of the unit rule.

Second, the District Court erred in concluding that discrimination against an identifiable political group was necessary to the application of strict review. This proposition was rejected in *Bullock v. Carter*, 405 U.S. 134 (1972). There this Court observed that while the filing fee requirement could not be described "by reference to discrete and precisely defined segments of the community as is typical of inequalities challenged under the equal protection clause . . . we would ignore reality were we not to recognize that this system falls with unequal weight on voters as well as candidates." *Id.* at 144. Similarly, the presence of discrimination against a specific political group was not considered necessary to the application of strict review in such cases as *Hill v. Stone*, 421 U.S. 289 (1975); *Kusper v. Pontikes*, 414 U.S. 51 (1973); and *Storer v. Brown*, 415 U.S. 724 (1974).

However, assuming *arguendo* that minimal review was proper, still the District Court erred in holding the interests identified survived such analysis. This follows since it was forced to employ the fictional approach in identifying the state interests and since the purposes asserted were not legitimate.

In several recent cases principled constitutional adjudication has been found to reject "a highly fictional approach to statutory purpose." *Brown v. Merlo*, 8 Cal. 3d 855, 865 n. 7 (1973). Thus in instances judicial review has been limited to analyzing only those purposes that have been expressly articulated. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17 (1973); *McGinnis v. Royster*, 410 U.S. 263, 270

(1973). See Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court*, 86 Harv. L. Rev. 1, 21 (1972). In order to derive the purposes of legislative action, four sources are to be reviewed: the preamble to the statute, the legislative history and the pronouncements of elected state officials or state courts. *Id.* at 46-47. As judged by these sources, however, the reasons for the unit rule do not appear.

Thus the District Court was forced to resort to the more fictional approach. In part, it held that the unit rule was a legitimate instrument in the narrowing processes that *must* take place prior to nomination. However, the validity of a state interest in compelling such a narrowing prior to nomination must be seriously doubted. For previously this Court has held only that "intraparty competition be settled before the general election by primary election or party convention." *American Party of Texas v. White*, 415 U.S. 767, 781 (1974). No case has yet sanctioned a state interest in narrowing the field of candidates at earlier levels and surely this should not be allowed herein where such an extreme narrowing is accomplished without express party sanction and with the effect of denying the "fluidity and overlap of philosophy . . . [of] political parties in this country." *Rosario v. Rockefeller*, 410 U.S. 752, 769 (1973) (Powell, J., dissenting).

The District Court further concluded that the unit rule was justified by the interest in building a winning consensus in support of the best candidate. Yet recent

history would cast substantial doubt about the validity of this interest, in light of its consequences. For example, although Senator Goldwater in 1964 and Senator McGovern in 1972 were able to achieve winning margins in the California primary, these victories were hardly able to sustain them in the general elections that followed where they suffered crushing defeats. Indeed, not only were they rejected by the general electorate, their nominations further caused deep divisions within their parties and wholesale defections from the ranks. Factional hostilities within the party were increased and coalition formation was defeated. Thus, rather than building a winning consensus as the District Court found, winner-take-all enabled distinctly minority candidates to achieve nomination at the very expense of that goal.

V. THE WINNER-TAKE-ALL PRIMARY MUST BE JUDGED UNDER A STRICT STANDARD OF JUDICIAL REVIEW

It cannot be gainsaid that in numerous instances this Court has reviewed infringements on voting and associational rights under a strict standard of review. *Hill v. Stone*, 421 U.S. 289, 298 (1975); *American Party of Texas v. White*, 415 U.S. 767, 780 (1974); *Storer v. Brown*, 415 U.S. 724, 736 (1974); *Kusper v. Pontikes*, 414 U.S. 51, 58-60 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 336-37 (1972); *Bullock v. Carter*, 405 U.S. 134, 144 (1972); *Abate v. Mundt*, 403 U.S. 182, 185 (1971); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 205 (1970); *Cipriano v. City of Houma*, 395

U.S. 701, 704 (1969); *Kramer v. Union Free School District*, 395 U.S. 621, 626-27 (1969); *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964). Where the strict standard applies, the inquiry becomes "whether [the statute is] necessary to further compelling state interests." *American Party of Texas v. White*, *supra*, at 780. It is true, of course, that the strict standard is not to be applied in every case. Its application is dependent upon an initial finding that the statute has "a real and appreciable impact on the exercise of the franchise" or that it thrusts "a significant encroachment upon associational freedom." *Bullock v. Carter*, *supra*, at 144; *Kusper v. Pontikes*, *supra*, at 58. Although variously phrased, this standard would appear to have the acceptance of all members of this Court. See *Hill v. Stone*, 421 U.S. 289, 304-305 (Rehnquist, J., dissenting). It is respectfully submitted that, following this standard, the California Primary must be strictly reviewed.

The decisions of this Court in the voting area, which have proceeded in two lines of development, would strongly substantiate this argument. Under the first line, whenever a decision of general interest is committed to the electoral process, resident citizens within the constituency may not be denied the right to participate in that election. Thus there is a prohibition against "fencing out from the franchise a sector of the population because of the way they may vote." *Carrington v. Rash*, 380 U.S. 89, 94 (1965). Yet this is precisely what winner-take-all accomplishes, that is,

an absolute exclusion of voters for non-plurality candidates from the national convention—where actual nomination is made—simply because of the way they vote.

The other part of the one person-one vote principle is that “statutes which may *dilute* the effectiveness of some citizens’ votes receive close scrutiny” since each voter is entitled to “fair and effective representation.” *Kramer v. Union Free School District, supra*, at 626; *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973). Underlying this has been the assumption that “every citizen has an inalienable right to full and effective participation in the political processes.” *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). It is submitted that under all of these standards the unit rule must be considered unconstitutional.

The substantiality of the burdens imposed by the unit rule on the voting rights extended by the party and the state cannot be considered, of course, without weighing their concomitant impact on the right “to associate effectively with the party of . . . choice.” *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). This discrimination exists in a dual sense.

First, the rule operates to prohibit supporters of non-plurality candidates from associating at the national convention and from exercising any political power therein simply because they cannot win a plurality vote. Thus the unit rule, like the statute condemned in *Williams v. Rhodes*, 393 U.S. 23 (1968), operates to keep “all parties off the ballot [at the

convention] until they have enough [votes] to win.” *Id.* at 32. Further, the statute overcomes the “right to have one’s voice heard and one’s view considered by the appropriate . . . authority . . . No matter what the institution to which the decision is entrusted, political groups have a right to be heard before it.” *Id.* at 41-42 (Harlan, J., concurring).

Second, not only may a majority be unable to join other party members at the convention, but they also “have their votes joined with those of their opponents to count against their own candidate at the national level. Since allocation formulas assign delegates to national conventions according to the total population and party vote within a state, a state receives delegate strength for all party factions—but that strength works to the disadvantage of all factions other than the one supporting the plurality winner. Delegates allocated to reflect the strength of non-plurality winners actually are awarded to an opponent. The winner-take-all primary is therefore doubly discriminatory—its rigid structure bars all factions, except supporters of the primary winner, from the national conventions and awards delegates allocated to represent all the factions to a single faction.” James F. Blumstein, *Party Reform, The Winner-Take-All Primary and the California Delegate Challenge*, 25 Vand. L. Rev. 975, 998-999 (1972). In essence, the effect of the unit rule is to stifle the “[c]ompetition in ideas and governmental policies [which] is at the core of the First Amendment freedoms.” *Williams v. Rhodes, supra*, at 32.

VI. THE WINNER-TAKE-ALL PRIMARY CONSTITUTES A SUBSTANTIAL INFRINGEMENT UPON CONSTITUTIONALLY PROTECTED RIGHTS.

In determining the substantiality of an infringement on voting and associational freedoms three factors becomes crucial: "[t]he facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams v. Rhodes*, *supra*, at 30. See *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). Upon reviewing these considerations, the heavy burdens imposed by the unit rule become undeniably apparent.

A. The Unit Rule Is Unique and Without Parallel In Other Representative Institutions.

A decision striking down the California Primary would be *sui generis* in many respects. No other state has a system of nomination whose consequences equal or exceed the severity of those that occur here. Indeed, from this fact alone a conclusion that the statute imposes a "facially burdensome requirement" would be proper. *Rosario v. Rockefeller*, 410 U.S. 752, 764 (1973) (Powell, J., dissenting). Although three other jurisdictions employ the rule—Oregon, Rhode Island and the District of Columbia—its use in those jurisdictions has significantly different consequences from those that follow in California. In those states the geographical size, population and political diversity which characterize California are lacking. As such, use of the rule therein may be supported by special considerations which do not arise in California. It should be observed, moreover, that mandatory use of

the rule has recently been abandoned by the California Democratic Party and South Dakota.

The uniqueness of a statewide winner-take-all rule compared with other institutions is equally undeniable. Below the Defendants admitted that no state chooses its legislators on a statewide winner-take-all basis and that Congress elects all its members from single member districts. Thus within other contexts the parallel use of the rule does not arise. Quite simply, the winner-take-all rule is a unique anomaly although undoubtedly the District Court opinion could serve as authority for extending the use of the rule to state legislatures or Congress.

B. Non-Judicial Forums Do Not Provide Possibility of Relief.

In other contexts this Court has held that the availability of other forums for relief, such as a properly apportioned legislature, is irrelevant. *Avery v. Midland County*, 390 U.S. 474, 481-82 fn. 6 (1968); *Kramer v. Union Free School District*, 395 U.S. 621, 628 (1969). Even assuming that this was not the case, however, the argument would be without practical significance herein. For historically the unit rule has placed California and its favorite son candidates in positions of power at the convention that they would not have otherwise obtained. Specifically, Governors Warren and Reagan have won the primary a total of four times. Thus resistance to change has been kept strong within this state.

Conceivably, of course, relief could come from the national party rather than the legislature. However,

this is not likely for two reasons. First, historically either the favorite son winner has cast his delegation to the party nominee or the primary winner has actually been the nominee. *See* Richard C. Bain and Judith H. Parris, *Convention Decisions and Voting Records*, Appendix C (2nd Edition 1973). Thus the dominant convention alliances have traditionally favored the unit rule. Second, voters for losing candidates in the primary are not represented at the convention while, concurrently, the winner-take-all delegation is present to oppose change. The operation of these factors together has tended "seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Products*, 304 U.S. 144, 153 fn. 4 (1938). Of course, where this occurs this is further ground to invoke "a correspondingly more searching judicial inquiry." *Id.*

C. Striking Down Winner-Take-All Would Advance Several Important Interests; The Existence of Less Restrictive Alternatives Further Supports Such Action.

By invalidating the California Primary several important individual and state interests would be advanced. For virtually any other selection system conceived might "prevent domination of an entire slate by a narrow majority . . . ease direct communication with [the representative] . . . reduce campaign costs, and . . . avoid bloc voting." *Chapman v. Meier*, 420 U.S. 1, 20 (1975). It would also avoid the complaint by voters who "feel that they have no representative specially responsible to them." *Id.* at 16.

Additionally, the state could devise a system that would protect "the substantial state interest in attempting to ensure that the election winner . . . represent a majority of the community." *Storer v. Brown*, 415 U.S. 724, 729 (1974); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). Lastly, at the very least the selection of delegates on any other basis would at least permit the *opportunity* of delegate selection actually reflecting, in a rough way, the preferences of the voters. The substantiality of this interest cannot be denied. This was so held in *Gaffney v. Cummings*, 412 U.S. 735 (1973), where an apportionment plan that was drawn with the intent of approximating the statewide strength of the political parties was both approved and commended. *Id.* at 752-54.

On the other hand, whatever state interests are supposed to be forwarded by the unit rule, it cannot be denied that they could "be protected by less severe means" that do not "broadly stifle the exercise of fundamental personal liberties." *Rosario v. Rockefeller*, 410 U.S. 752, 770 (1973) (Powell, J., dissenting); *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973). Indeed, most states do employ a variety of less severe selection methods without damage to the party or state structure. Conceptually a good number of other U.S. 23, 46 fn. 8 (Harlan, J., concurring). Considering the broad range of less restrictive alternatives schemes are possible. *See Williams v. Rhodes*, 393 available and the importance of the rights involved herein, any reasons favoring the unit rule recede into insignificance.

CONCLUSION

This Appeal raises several substantial questions of first impression. It relates to matters of great public importance and fundamental concern. As argued herein, the resolution of these questions by the District Court is not free from considerable doubt. Since the questions presented are likely to arise in subsequent cases and since this Appeal comes before the Court in a timely manner, it is respectfully submitted that probable jurisdiction should be noted and the cause set for plenary consideration.

Dated: November 14, 1975.

Respectfully submitted,
JAMES S. GRAHAM,
ODELL & GRATHWOHL,
Appellant Pro Se.

JAMES E. SHELDON,
TESTA, HURWITZ & THIBEAULT,
JAMES F. BLUMSTEIN,
Of Counsel.

MOTION FOR EXPEDITED HEARING

I, JAMES S. GRAHAM, declare:

I am a Member of the California Bar admitted to practice on December 19, 1973. This affidavit is submitted to apprise the Court of the time considerations surrounding this appeal.

Under Cal. Elec. Code § 2503 the next California presidential primary will be held on June 8, 1976. However, candidates will begin to allocate their resources among the states at a much earlier date since several primaries will take place prior to that time. Appellant is informed and believes that the first primary will be in New Hampshire since N.H. Rev. Stat. Ann. § 57:1 has recently been amended setting the next primary date for February 24, 1976.

In light of these timing considerations, Appellant respectfully requests that should this Court believe plenary consideration to be warranted in this case, that a hearing date be set for some time next year on a schedule that would be consistent with the needs of deliberate judicial review as well as the interests of candidates and voters.

JAMES S. GRAHAM

Subscribed and sworn to before me
this 19th day of November, 1975.

DAPHNE M. STANNARD
Notary Public for the City and County of
San Francisco and the State of California

(Appendices Follow)

APPENDIX

Appendix A

United States District Court
Northern District of California

James S. Graham,	Plaintiff,	No. C-74-487 SC
vs.		
March Fong Eu, Secretary of State, and Republican State Central Com- mittee of California,	Defendants.	
Chet Hollifield, et al.,	Plaintiffs,	No. S-2489 SC
vs.		
March Fong Eu, Secretary of State,	Defendant.	

[Filed July 28, 1975]

Before: BROWNING, Circuit Judge, and EAST
and CONTI, District Judges*

CONTI, D.J.:

These cases raise a constitutional question of first impression, specifically, to what extent, if any, are the

*Honorable James R. Browning, United States Circuit Judge for the Ninth Circuit, William G. East, Senior United States District Judge for the District of Oregon, and Samuel Conti, United States District Judge for the Northern District of California, constituting a statutory three-judge District Court by designation of Chief Judge Richard H. Chambers for the Ninth Circuit, dated April 8, 1974.

respective plaintiffs entitled to representation at the Republican and Democratic national conventions. Plaintiff in No. C-74-487 SC is a registered Republican voter in California. He instituted suit on his own behalf against the Republican State Central Committee of California and the Secretary of State of California. The plaintiffs in No. S-2489 SC are registered Democratic voters in California. On their own behalf and for all who are similarly situated¹ they have sued the Secretary of State of California.

Both cases originated as challenges to a statewide-at-large system of electing delegates from California to the Republican and Democratic party conventions.² The Democratic plaintiffs were first to dispute the validity of the scheme by bringing the second entitled lawsuit on June 23, 1972, in District Court for the Eastern District of California. That court denied plaintiffs' request for the convening of a three-judge court and dismissed the complaint. Plaintiffs' appeal resulted in an order of reversal and remand necessitating the convening of a three-judge court. In the meantime, the Republican plaintiff filed his case in this District Court for the Northern District of California and also requested the convening of a three-judge court. His request was granted. Furthermore, by order of the Chief Judge of this Circuit this court was specially assigned to the Eastern District of California in order that these two cases could be heard on a consolidated basis. Accordingly, a hearing on the merits of both cases was held on February 26, 1975.³

The contested manner of electing delegates to the Republican National Convention is set forth chiefly at California Elections Code §§6000 - 6262 and §§10260 - 10265. Provisions of the Elections Code pertinent to this case are reproduced in the margin.⁴ The focus of Graham's challenge is the fact that under present state law Republican voters cannot cast votes for individual candidates for the position of delegate to the Republican Party's convention.⁵ Instead, a Republican must vote for a bloc of delegates who are committed to the candidacy of a presidential aspirant.⁶ And even then a voter does not cast a ballot for the members of one slate of delegates as opposed to the members of another, since the names of individual candidates who comprise the various slates are not listed on the ballot.⁷ Only the names of the presidential aspirants⁸ appear on the ballot. And whichever aspirant collects the highest number of votes is entitled to have that entire slate of delegates supporting his or her candidacy certified exclusively to represent California at the Republican National Convention. In this sense, therefore, the entire California delegation to the convention is a reward to the victorious Republican candidate and the primary—to borrow the vernacular expression—is winner-take-all.⁹

The procedure established by California for electing delegates to the Democratic National Convention, although once the same as for Republicans, is now markedly different.¹⁰ Fearing a return to a statewide-at-large election of delegates to the Democratic Na-

tional Convention,¹¹ the Democratic plaintiffs have joined in the Republican plaintiff's attack on the constitutional validity of a winner-take-all system.¹² Moreover, they seek a declaration of unconstitutionality as to the recently promulgated, but as yet unused, Alquist Open Presidential Primary Act.¹³ This act permits voting for individual delegates rather than for slates and promotes selecting convention delegates from Congressional districts rather than on a statewide basis. Under the Alquist Act once the number of delegates in the Democratic Party's call for California is ascertained, 75% of the delegates in the call will be assigned to each of California's forty-three Congressional districts in accordance with an apportionment formula which reflects the strength of the Democratic Party in that district.¹⁴ Steering committees, committed to no-one in particular nor to a specific presidential aspirant, will prepare forty-three slates of candidates for the delegate positions assigned to each district.¹⁵ And every slate of delegates will be entirely pledged to the nomination of a particular presidential candidate or be totally uncommitted.¹⁶ The ballots will list the names of all candidates running for a delegate position from an individual district, as well as their presidential preferences, and a voter will be confronted with the following instructions:

"You are not required to cast all of your votes for candidates pledged to the same presidential candidate. You may distribute your votes among individual candidates for delegates pledged to different presidential candidates or you may cast

all your votes for candidates pledged to the same presidential candidate.

"Vote for [number¹⁷] delegates."¹⁸

After the election results have been recorded, the elected delegates will meet to choose the remaining 25% of the party call for California.¹⁹ This will be accomplished by holding separate caucuses of the elected delegates who are pledged to the various candidates or who are members of an uncommitted delegation.²⁰ Each caucus will be entitled to select the same percentage of the remaining 25% of the California Democratic Party's call as the number of delegates comprising the caucus is of the total number of elected delegates.²¹

Each of these delegate election schemes, plaintiffs allege, create invidious discriminations against those who cast ballots for losers and accordingly violate rights guaranteed the losing voters by the First and Fourteenth Amendments. The Republican plaintiff argues that electing California's delegates to his party's national convention from each Congressional district—a system incorporated in the new scheme for Democrats—would comport with federal constitutional requirements. On the other hand, we understand the Democratic plaintiffs to argue that nothing short of a statewide election of delegates on a proportional basis²² is permissible.

Plaintiffs contend that failure to provide convention representation for those who support losing candidates is an unconstitutional denial of "fair and effective representation" and the "right to cast an

effective ballot.”²³ The argument is that the Equal Protection Clause prohibits the state from denying losers balanced representation in the forum in which a presidential nominee is finally chosen. This interpretation of the Equal Protection Clause was rejected by the Supreme Court in *Whitcomb v. Chavis*, 403 U.S. 124 (1971).²⁴

Whitcomb involved a challenge to a state statute establishing Marion County, Indiana, as a multi-member district for the election of state legislators. A central thesis of the plaintiffs’ case was the same as that presented here: that is, that the winner-take-all aspect of a multi-member district disenfranchises those who support losers, since they have no representative of their own, and at the same time over-represents those who support winners, since they receive all of the legislative seats with less than all of the popular vote. The Court explained that these results are simply consequences of losing elections. Briefly put, it is not “a denial of equal protection to deny legislative seats to losing candidates.” 403 U.S. at 153. The Court rejected the contention “that any group with distinctive interests must be represented in [the final decision-making forum] if it is numerous enough to command at least one seat.” 403 U.S. at 156.

The Court warned that multi-member districts may run afoul of the Equal Protection Clause if in fact they “‘operate to minimize or cancel out the voting strength of racial or political elements of the voting population.’” 403 U.S. at 143, quoting *Fortson v.*

Dorsey, 379 U.S. 433, 439 (1965), and *Burns v. Richardson*, 384 U.S. 73, 88 (1966). The Court pointed out, however, that it does not suffice to show that an identifiable group has perennially failed to elect representatives in proportion to its voting strength. 403 U.S. at 149. It must be factually demonstrated that the group allegedly discriminated against “had less opportunity than did other[s] . . . to participate in the political processes and to elect [delegates] of their choice.” *Id.* Neither set of plaintiffs has made such a showing with respect to the California system of selecting delegates for the two major parties.²⁵

The Republican plaintiff argues that the essential vice of the Republican primary is its statewide character. With respect to a state as large and populous as California, “fair and effective representation,” he contends, requires that delegates to the national convention be selected in district elections so that minority interests within the California population may have a better chance to elect some delegates of their choice. The size of a district is not in itself a sufficient reason to impose judicial redistricting, even if the “district” is co-extensive with state boundaries. The Court has noted that a case of vote dilution with respect to an identifiable group might be easier to prove “when the [multi-member] district is large and elects a substantial proportion of the seats in either house of a bicameral legislature.” *Whitcomb v. Chavis*, *supra*, 403 U.S. at 143. But whether or not the size factor is present, “proof of lessening or can-

cellation of voting strength must be offered." *Chapman v. Meier*, 420 U.S. 1, 17 (1975).²⁶

Finally, the Republican plaintiff suggests that *Whitcomb* should be distinguished on the ground that in *Whitcomb* the plaintiffs had been given an equal opportunity to participate in the direct primary election at which legislative candidates were finally chosen, while in this case the winner-take-all rule is applied at a preliminary stage of the nomination process. See *Whitcomb v. Chavis*, *supra*, 403 U.S. at 149. The Constitution does not require that voters be afforded an opportunity to participate at either final or preliminary stages in the nomination process for presidential candidates. Whether the voters will participate in the delegate selection process, and, if so, at what stage, and whether their participation will be translated directly into delegate representation at the national conventions are matters for the political parties themselves to determine,²⁷ and, if the parties permit it, for the states.²⁸ Cf. *Fortson v. Morris*, 385 U.S. 231, 233, 234 (1966). Assuming the Equal Protection Clause to be applicable here, it requires only that when an election is held in the delegate selection process, the weight assigned to individual votes cannot depend on where individual voters live or whether they belong to identifiable racial or political groups. See *Developments in the Law, Elections*, 88 Harv. L. Rev. 1111, 1118-19 (1975). There are no claims of geographic discrimination in these cases,²⁹ and neither set of plaintiffs has made a factual showing of discrimination against

an identifiable racial or political group. All that appears is that losing voters are denied convention representation, not because of their support of particular candidates, but because the candidates they have been chosen to support have lost an election. This is not a denial of equal protection.³⁰

The Republican plaintiff briefly suggests that the winner-take-all Republican primary is an unacceptable infringement on "the right of individuals to associate for the advancement of political beliefs," because the supporters of losing candidates are denied the opportunity to be heard at the national convention, through their own delegate representation. "The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political association." *Williams v. Rhodes*, 393 U.S. 23, 41 (1968) (Harlan, J., concurring). But the right to bring one's views to the attention of a final decision-making forum does not include a right to official representation within the forum itself. If the right of association included a right of proportional representation, *Whitcomb v. Chavis* could not have been decided as it was. Cf. *Cousins v. Wigoda*, 419 U.S. 477, 488 n.8 (1975).

For these reasons, and on the records developed in these cases, we conclude that the California methods of electing delegates to the two major national conventions do not violate the First or Fourteenth Amendment rights of those who vote for losing candidates.

With respect to the Republican primary, we wish to add that we find support for our conclusion in the analogy between this statewide primary and the universal practice of electing presidential electors on a statewide winner-take-all basis. In *Williams v. Virginia State Board of Elections*, 288 F. Supp. 622 (E.D. Va. 1968), *aff'd mem.*, 393 U.S. 320 (1969), use of the winner-take-all election was upheld in the electoral college context against the very arguments that the Republican plaintiff makes against the California winner-take-all primary.³¹ The plaintiffs in *Williams v. Virginia State Board of Elections* sought to have the winner-take-all method of choosing electors declared invalid and to require Virginia to provide for the election of presidential electors from districts within the state. They argued that the winner-take-all system debased, abridged, and misrepresented the weight of votes cast by persons within Virginia by overvaluing the votes of those who voted for the plurality winner and discarding the votes cast for losers. The court recognized that the unit rule might produce objectionable results, including election of a President who had not received a plurality of the popular vote in the nation as a whole, but it read the one person-one vote cases to require only that each citizen's vote be of equal weight in the election itself:

"In the selection of electors the [winner-take-all] rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote. Admittedly, once the electoral slate is chosen, it speaks only for the element

with the largest number of votes. This in a sense is discrimination against the minority voters, but in a democratic society the majority must rule, unless the discrimination is invidious. No such evil has been made manifest here. Every citizen is offered equal suffrage and no deprivation of the franchise is suffered by anyone."

288 F. Supp. at 627.³²

In short, the Constitution does not require that when a state provides that its citizens shall vote for presidential electors the votes for losing candidates must be made more "effective" by affording, through districting, a greater opportunity for those votes to be translated into voting strength in the electoral college itself.³³

The Republican plaintiff seeks to distinguish the holding in *Williams v. Virginia State Board of Elections* on a number of grounds. First, he argues that while Article II, Section 1, expressly grants the states broad power in deciding how to appoint electors, it does not grant the states any authority with respect to the nomination of presidential candidates. It is true that "[t]he States themselves have no constitutionally *mandated* role in the great task of the selection of Presidential and Vice-Presidential candidates," *Cousins v. Wigoda, supra*, 419 U.S. at 489-90 (emphasis added), but this does not mean that the states are prohibited from legislating in the area, at least insofar as the legislation is not inconsistent with party policy. For the moment, at least, California *does* have a role in deciding how California voters

will participate in the selection of the Republican nominee for President. Plaintiff does not contend otherwise. In furtherance of its power, however derived, California has passed a statute providing for a winner-take-all election, just as it has provided for the selection of presidential electors on a state-wide basis.³⁴

It is difficult to see how the source of the state's power to provide election machinery has any bearing on whether the state has exercised that power in a way that satisfies the Fourteenth Amendment. In *Williams v. Virginia State Board of Elections*, *supra*, 288 F. Supp. at 626, the Court recognized that the power expressly granted to Virginia under Article II, Section 1, was nevertheless limited by the Fourteenth Amendment. Had the court determined that the winner-take-all method conflicted with the Fourteenth Amendment, nothing in Article II, Section 1, would have prevented the court from imposing the districting remedy. After considering allegations of vote dilution and cancellation that are indistinguishable from those presented in this case, the court specifically held that the winner-take-all election was consistent with the Equal Protection Clause. Nowhere did the court suggest that the express grant of authority under Article II, Section 1, somehow relaxed the otherwise applicable standard of review under the Fourteenth Amendment. *See Williams v. Rhodes*, *supra*, 393 U.S. at 29.

The Republican plaintiff points to the fact that selection of presidential electors is next to the final

stage of the process of selecting a President. By way of contrast, the Republican plaintiff argues:

"The selection of delegates within each state constitutes only a preliminary part of the multifaceted processes leading to the selection of a president. At this level full recognition of voter sentiment is imperative. If nominating procedures are structured so as to allow minorities to control the intermediate stages of the nominating processes, there is substantial risk of having the presidential nominee reflect the will of only a narrow political faction."

The force of the electoral college analogy does not derive merely from the fact that the selection of convention delegates is part of the overall presidential election process, although this relationship may justify reliance on the electoral college analogy in the first instance. *See Bode v. National Democratic Party*, 452 F.2d 1302, 1307-09 (D.C. Cir. 1971). *Compare Gray v. Sanders*, 372 U.S. 368, 378 (1963). The electoral college system is pertinent because it operates to select a single winner from a field of candidates, just as the nominating process does. The choice of delegates to a national convention from which a single nominee must emerge occurs at the same stage in the nominating process as does the election of electors, who must, finally, choose a single President. For each system to operate, there must be exclusion of losing candidates at some point. If the Constitution does not require that electors be chosen from districts in order to make it more likely that votes for losing presidential candidates will be registered in the electoral college (the

final decision-making forum), it is not apparent why convention delegates must be chosen from districts in order to insure that all candidates for the nomination will have a greater opportunity for representation at the convention that finally selects a nominee. In each case, the selection of representatives to cast the ultimate vote is itself part of the narrowing process.

Finally, the Republican plaintiff points out that the electoral college members vote only once, in their respective state capitals, and if no winner emerges, the choice is left to the House of Representatives. In contrast, plaintiff argues, the convention is a deliberative body and therefore representatives of all candidates should be present. As noted *supra*, note 27, the extent to which a convention is deliberative depends largely on how the party and the states choose to structure the nominating process. Recent history demonstrates that the convention is usually no more deliberative than the electoral college. Frequently, one candidate emerges from the state primaries, conventions, and caucuses with so many committed delegates that his nomination is as assured as is the election of a particular presidential candidate after the general election but before the electors convene. In each case, the final decision-making forum is little more than a vote-registering mechanism. Only a single vote of the representatives is necessary to confirm a choice already made in the states.³⁵

This opinion shall constitute the court's findings of fact and conclusions of law, in accordance with Rule

52 of the Federal Rules of Civil Procedure. The defendants shall prepare for the court, and serve upon plaintiffs, proposed forms of judgments in conformity with this opinion. The proposed judgments shall be lodged with the court and served upon plaintiffs within five (5) days following the filing of this opinion.

Dated: July 28, 1975.

James R. Browning

United States Circuit Judge

William G. East

United States District Judge

Samuel Conti

United States District Judge

FOOTNOTES

¹We have not certified or rejected No. S-2489 as a class action. As will become evident, this will not be necessary.

²As discussed more fully below, a winner-take-all method is mandated by California Election Code §6201 (West 1961) for the election of California's delegation to the Republican National Convention and was mandated by former California law, e.g., Chap. 1821, §2 [1971] Calif.Stats. at 3965 (repealed 1974) for the election of California's delegation to past Democratic National Conventions.

³At the time of the February 26 hearing a motion for summary judgment on behalf of the Republican plaintiff was pending. In support of this motion the Republican plaintiff submitted his own declaration and the declarations of Daniel A. Mazmanian, a political scientist, and Representative Paul N. McCloskey, Jr., an unsuccessful candidate for the Republican presidential nomination in 1972. In opposition to the motion the defendant Republican State Central Committee submitted an affidavit by Putnam Livermore, a former Republican party official.

The parties were informed, without objection from any of them, that the February 26 hearing would serve both as a hearing on the Republican plaintiff's motion for summary judgment and as a trial on the

merits of both cases. All parties were afforded an opportunity to introduce testimony in support of their positions, but submitted the cases on the declarations and affidavits previously filed plus a statement of the vote for the California presidential primaries from 1912 to 1972, inclusive, introduced by defendant Secretary of State.

⁴§6020. Notice to secretary of state

The chairmen of the state central committee of each of the political parties qualified to participate in the presidential primary shall notify the Secretary of State on or before the first day of March immediately preceding the presidential primary as to the number of delegates to represent the state in the next national convention of his party.

§6050. Joinder of three or more voters as committee in proposing nomination of candidates for delegates

Any three or more voters of the state who are registered as intending to affiliate with the same political party may join as a committee in proposing the nomination of a group of candidates for delegates. The committee may elect its officers, select the candidates for delegates, select the chairman of the committee, arrange for the appointment of verification deputies, secure the endorsement of the person, if any, preferred by the committee as candidate for presidential nominee, appoint alternates, assemble and file all necessary papers, and take all other action which may be necessary for the organization and election of the group. The committee in performing its functions may act through its officers or designated representatives.

§6055. Endorsement of group by candidate for presidential nominee

Each group of candidates for delegates, which intends to pledge itself to the candidacy of a particular candidate for presidential nominee, shall have the endorsement of the candidate for presidential nominee for whom the members of the group have filed a preference. The endorsement of the candidate for presidential nominee shall be filed with the Secretary of State before the circulation of any nomination papers of a group of candidates pledged to the support of his candidacy as a presidential nominee.

§6081. Nomination paper

... upon the filing of nomination papers pursuant to this chapter, the persons named in such papers shall be voted upon as delegates to the respective national conventions of the several political parties, but their names shall not be printed upon the ballots of their respective parties.

§10261. Arrangement of ballot in parallel columns

The names of the candidates for delegates of any political party shall not appear upon the ballot. In lieu thereof the names of the persons preferred for President by each group of candidates, or the name of the chairman of each group that has designated no preference, shall be arranged upon the ballot of the party in a column...

§6260. Ballot; space for write-in

Notwithstanding any other provisions of law, a space shall be provided on the presidential primary ballot for an elector to write in the name of a candidate for President of the United States.

§6201. Certification of election

Immediately after he has compiled the returns of the votes for delegates, the Secretary of State shall issue a certificate of election as to each [political] party, to each person who is a member of the group which received the largest vote cast for any group of that party, such person thereby being elected as delegate to his national party convention.

§6262. Delegates to national convention

Any person who receives, by write-in vote, a plurality of the votes cast for President of the United States shall, within 10 days after the primary election, file a list of delegates to the national convention of his political party with the Secretary of State in the manner prescribed in Sections 6053 and 6054.

Although the names of the candidates for delegates do not appear on the ballot, their names are published in newspapers, Calif.Elec.Code §6172 (West Supp. 1975), and are posted in the county clerks' offices, Calif.Elec.Code §10010 (West Supp. 1975). Prior to 1941 the names of the candidates for delegates did appear on the ballot and a political party member could vote for any number of delegates up to the number of delegates in the party's call regardless of an individual delegate's preference as to a presidential nominee. Chap. 137, §7 (1915) Calif.Stats. at 284 (repealed 1941). At that time, however, a space was also provided so that a party member could vote for an entire slate of delegates pledged to one presidential candidate by making one mark on the ballot. *Id.* And an examination of the statements of the vote from 1912 through 1940 indicates that this straight

ticket means of voting was followed by the overwhelming number of voters.

⁵See Calif.Elec.Code §10317 (West Supp. 1975).

⁶The number of candidates for delegate status on each slate is the same as the number of delegates allotted to California by the Republican National Party. Calif.Elec.Code §6052 (West 1961); slates uncommitted to a particular presidential aspirant are permissible, Calif.Elec.Code §6001 (West 1961).

⁷Calif.Elec.Code §§6081 (West Supp. 1975), 10261 (West 1961).

⁸When a slate of delegates is not pledged to a particular presidential nominee the name of the chairperson of the delegation is listed on the ballot. Calif. Elec.Code §10261 (West 1961).

⁹California is not alone in resorting to a unit rule for election of delegates to the Republican National Convention. The laws of Oregon, Ore.Rev.Stat. §249.221(2) (1971), Rhode Island, RI.Gen.Laws §17-12.1-11 (Supp.1974), and the District of Columbia, D.C. Code Ann. §§1-1105(b)(3)-(5) (Supp. 1974-5), all provide for winner-take-all presidential primaries. However, due to the size of its population and a very real potential for political diversity, the effect of a winner-take-all rule is unquestionably most dramatic in California.

¹⁰The former practice of electing delegates to the Democratic National Convention on a winner-take-all

basis has been replaced by the procedures set forth in the Alquist Open Presidential Primary Act, Calif. Elec.Code §§6300-6390 (West Supp. 1975).

¹¹The Democratic plaintiffs suggest that the Alquist Open Presidential Primary Act contravenes the state constitution. Brief for Democratic plaintiffs, at 28-29. We intimate herein no views on that matter. The author of the act has, however, introduced new legislation, Calif.S.B.No.288(1975), which would repeal the act.

¹²Brief for Democratic plaintiffs, at 20-22.

¹³Calif.Elec.Code §§6300-6390 (West Supp. 1975). The act is limited to the election of California's delegates to the Democratic National Convention.

¹⁴The formula is set forth at Calif.Elec.Code §6304 (West Supp. 1975):

"The number of delegates which each congressional district may elect shall be based on a formula which apportions 75 per cent of the total delegation allocated to the state by the Democratic National Committee (rounded to the nearest whole integer) among the congressional districts in a manner which gives equal weight to the average of the vote in each district for Democratic candidates in the two immediately preceding presidential elections and to the Democratic Party registration in each district on January 1 of the presidential primary year."

¹⁵Calif.Elec.Code §§6375, 6376 (West Supp. 1975).

¹⁶Calif.Elec.Code §6378 (West Supp. 1975).

¹⁷The number of votes each voter is entitled to cast is equal to the number of delegates to be elected from that person's district. Calif.Elec.Code §10282 (West Supp. 1975).

¹⁸Calif.Elec.Code §10283 (West Supp. 1975).

¹⁹Calif.Elec.Code §6380.5 (West Supp. 1975).

²⁰*Id.*

²¹*Id.*

²²Brief for Democratic plaintiffs, at 5.

²³It is easy to understand the Republican plaintiff's objection to the winner-take-all primary. When voters must choose among three or more presidential candidates (and, consequently, three or more slates of delegates), the possibility exists that the majority of voters will go unrepresented, while a minority enjoys overrepresentation at the convention. For example, this became a reality in the 1972 Democratic presidential primary in California, the last Democratic primary conducted under the winner-take-all rule. Senator McGovern received 1,550,652 votes or 43.5% of the total popular vote. But because he received the highest number of votes among the presidential candidates, according to state law the slate of delegates committed to his candidacy represented California exclusively at the convention, and the 2,013,866 California Democrats casting votes for other candi-

dates were completely unrepresented at the convention. The reason for the Democratic plaintiffs' dissatisfaction with the Alquist Open Presidential Primary Act is not as readily apparent. We infer from their argument that under the new act a minority of voters may go unrepresented or underrepresented at the national convention. *See* Brief for Democratic Plaintiffs, at 19. A complete lack of proper representation will occur, according to plaintiffs' argument, whenever none of the delegate candidates supporting a particular presidential aspirant are able to win a delegate position in any of California's 43 districts, but the statewide total of all votes cast for some delegate supporting that aspirant are proportionally sufficient to merit one or more places in the whole California delegation. Similarly, underrepresentation will occur whenever a presidential aspirant has managed to get at least one of the delegates supporting his or her candidacy elected but would be entitled to more places in the delegation if the votes were counted on a statewide basis.

²⁴The Republican plaintiff places great reliance on *Gray v. Sanders*, 372 U.S. 368 (1963), invalidating a Georgia primary election system for various statewide officers. Under the Georgia scheme, each voter was given one vote. In counting the votes, a "county unit system" was employed, under which the popular vote was tallied on a county-by-county basis, the winners in the county elections were awarded the counties' unit votes, and the candidate with the most unit votes was declared winner of the primary. The Court held this

scheme invalid because it weighted "the rural vote more heavily than the urban vote and weight[ed] some small rural counties heavier than other larger rural counties." 372 U.S. at 379. During the course of litigation in *Gray*, Georgia amended its county unit system to allocate unit votes to the counties in proportion to their population. The Court held this did not cure the defect, stating:

"The county unit system, even in its amended form . . . would allow the candidate winning the popular vote in the county to have the entire unit vote of that county. Hence the weighting of votes would continue, even if unit votes were allocated strictly in proportion to population. Thus, if a candidate won 6,000 of 10,000 votes in a particular county, he would get the entire unit vote, the other 4,000 votes for a different candidate being worth nothing and being counted only for the purpose of being discarded."

372 U.S. at 381 n.12.

The Republican plaintiff argues that under *Gray* it is impermissible to discard or "wash out" losing votes at a stage prior to actual nomination. *Gray* lays down no such rule. As explained in *Gordon v. Lance*, 403 U.S. 1, 5 (1971), the defect considered in *Gray* was solely that of "geographic discrimination," that is, "Votes for the losing candidates were discarded solely because of the county where the votes were cast." The Republican plaintiff makes no claim of geographic discrimination.

²⁵Although the Republican party has employed a statewide winner-take-all system for over 30 years,

the Republican plaintiff has failed to demonstrate factually that any identifiable group has been denied, because of racial or political differences, an opportunity to participate in the Republican primary and to elect delegates of its choice.

With respect to the Democratic plaintiffs, such a showing would be impossible at this time because the delegate selection system prescribed by the Alquist Act has not yet been applied in a primary election.

²⁶The size factor to which the Court has referred concerns the legislative strength of a multi-member district in relation to the total number of legislative seats in either house of a bicameral state legislature. At the 1972 Republican Convention, the California delegation comprised only 7% of the total number of delegates.

²⁷At least with respect to California's Republic primary, it could be argued that *Whitcomb* is distinguishable because the delegates elected in that primary are committed to support only the winner of the primary, and it is therefore certain that losing candidates will not be represented at the national convention. The argument is that vote dilution is inherent in the California primary, absent a requirement of proportional representation, because the delegates are not required to represent the interests of the entire constituency, as are representatives in legislative bodies. See *Dallas County, Alabama v. Reese*, _____ U.S. _____, _____ (1975). Definition the role of the convention delegate is initially a matter for the political party, not

the courts. *Cf. Cousins v. Wigoda*, 419 U.S. 477, 489-90 (1975). A political party may rationally decide either that the convention should be as representative and deliberative as possible, or, on the other hand, that intra-party disputes should be resolved largely within the delegate selection process itself, the convention serving principally as a vote-registering device to confirm choices already made. The Equal Protection Clause requires only that once the delegates' role is determined, any opportunity the voters may be given to participate in the delegate selection process cannot be denied or diminished on account of geographic, racial, or political differences.

See also Whitcomb v. Chavis, where the Court stated (403 U.S. at 155):

"Moreover, even assuming bloc voting by the delegation contrary to the wishes of the ghetto majority, it would not follow that the Fourteenth Amendment had been violated unless it is invidiously discriminatory for a county to elect its delegation by majority vote based on party or candidate platforms and so to some extent predetermine legislative votes on particular issues. Such tendencies are inherent in government by elected representatives; and surely elections in single-member districts visit precisely the same consequences on the supporters of losing candidates whose views are rejected at the polls."

²⁸We have been presented with no claim of conflict between party rules and state law with respect to California's method of selecting national convention delegates. *See Cousins v. Wigoda*, 419 U.S. 477 (1975). We note, however, that the California State

Democratic Central Committee has resolved to request a ruling from the Democratic National Committee regarding the validity, under party rules, of the selection procedures prescribed by the Alquist Act.

²⁹*Compare Bode v. National Democratic Party*, 452 F.2d 1302 (D.C. Cir. 1971); *Georgia v. National Democratic Party*, 447 F.2d 1271 (D.C. Cir. 1971); *Doty v. Montana State Democratic Cent. Comm.*, 333 F. Supp. 49 (D. Mont. 1971); *Maxey v. Washington State Democratic Comm.*, 319 F. Supp. 673 (W.D. Wash. 1970).

³⁰Because of this conclusion we need not decide whether the California presidential primaries are justified by "compelling" state or party interests, and it cannot be said that the means chosen to select California delegates to the two major conventions are irrational in terms of the interest in selecting the best possible candidate and building a winning consensus in support of him. *See A. Bickel, Reform and Continuity* 57 (1971); *cf. Storer v. Brown*, 415 U.S. 724, 729-36 (1974).

³¹The winner-take-all method of choosing presidential electors was also challenged in an original action brought by 13 states against the other 37 and the District of Columbia. The 13 states sought to require that electors be chosen from districts, and, as an interim measure, to require that the electoral votes be cast in proportion to the popular vote each candidate received in the state. *See R. Dixon, Democratic Representation* 565-69 (1968). The Supreme Court refused

to entertain the suit. *Delaware v. New York*, 385 U.S. 895 (1966).

In *Penton v. Humphrey*, 264 F. Supp. 250 (S.D. Miss. 1967) (3-judge court), the court dismissed, for failure to state a claim, a complaint challenging the winner-take-all method. Relying on *Delaware v. New York*, the court rejected the plaintiffs' argument that each state's electoral votes must be divided according to the popular vote that each candidate received.

³²The district court was also unimpressed with the argument "that on a national basis, the State unit system's cancellation of States' minority votes causes inequities and distortions of voting rights among citizens of the several States, by arbitrarily isolating the effects of votes cast by persons of a particular political persuasion or party in one State, from those cast by voters of the same persuasion or party in other States." 288 F. Supp. at 628. It viewed these interstate distortions as an inevitable consequence of the constitutional decision to fragment the election process among the several states. 288 F. Supp. at 628-29.

³³In *Williams v. Rhodes, supra*, the Supreme Court held that the rights of supporters of George Wallace to associate to advance their political beliefs and to cast effective votes in the general election were infringed by statutory provisions that made it virtually impossible for them to get their candidate's name on the Ohio presidential ballot. But the right to cast an "effective" vote announced in *Williams v. Rhodes* insured only that supporters of a particular candidate

for President would have a reasonable opportunity to offer their candidate to the electorate and to vote for him themselves. The Court did not suggest that votes for a candidate who was placed before the electorate but lost would be considered ineffective unless Ohio's electors were apportioned among the candidates to reflect their popular support, or were selected from single-electoral districts. In other words, it was not necessary that voter support be translated into voting strength in the electoral college, the final decision-making forum. The Court's affirmance in *Williams v. Virginia State Board of Elections* just a few months later confirms the limited reach of the "effective ballot" rationale of *Williams v. Rhodes*, one of the principal cases relied upon by the Republican plaintiff.

If the rationale of the two *Williams* cases, both of which dealt with the electoral college, is applied to the California primary, it is clear that the Constitution would require only that a candidate who has demonstrated at least some following among the electorate must be permitted to appear on the ballot so his supporters will have an effective choice among potential nominees and be assured that if the candidate appeals to enough voters he will capture all of California's delegates. The holding of the second *Williams* case would foreclose any argument that votes cast for a losing candidate must nevertheless be given some weight at the convention.

³⁴In the early years of the Republic, the states chose electors in a variety of ways. In some states, the

electors were chosen by the state legislature, in some they were chosen by the people in a statewide winner-take-all election, and in others they were elected from separate districts within the state. Variants of each of these methods were also employed. *See generally* *McPherson v. Blacker*, 146 U.S. 1, 29-33 (1892). Virginia switched from district elections to the at-large general ticket method in 1800 on the advice of Thomas Jefferson. *Id.* at 31.

"His advice sprang from a desire to protect his state against the use of the general ticket by other States. He found that when chosen by districts, Virginia's representation among the electors was divided, while other States made their votes mean more in the college by adoption of the general ticket scheme of selection. This contention is no less true today.

Williams v. Virginia State Board of Elections, *supra*, 288 F. Supp. at 626. After 1832, electors were chosen in winner-take-all elections in all of the states except South Carolina, where the legislature chose them through 1860. *McPherson v. Blacker*, *supra*, 146 U.S. at 32-33. Colorado's electors were chosen by the legislature in 1876, and Michigan used the district method of election in 1892. Since then, however, the winner-take-all election has been used in all of the states. W. Goodman, *The Two-Party System in the United States* 158-59 (3d ed. 1964).

The wide range of means employed in selecting convention delegates today is comparable to that which prevailed in the selection of presidential electors in the early days of the Republic. In some states, dele-

gates are elected in a winner-take-all election, in some they are appointed by state party committees, and in some they are selected in the course of caucuses or conventions at both the state and local levels. *See generally* *Nomination & Election of the President and Vice President of the United States*, Pamphlet prepared for the Office of the Secretary of the Senate 72-173 (1972).

³⁵Voting for the Republican nominee has not gone beyond the first ballot since 1948. More than one ballot has been required at the Democratic convention only once (in 1952) since 1936, when the Democratic Party dropped the rule requiring that a nominee receive the votes of two thirds of the delegates. *See* R. Bain & J. Parris, *Convention Decisions & Voting Records*, Appendix C (1973).

Appendix B

United States District Court
Northern District of California

No. C-74-487 SC

James S. Graham,		Plaintiff,
vs.		
March Fong Eu, Secretary of State, and Republican State Central Com- mittee of California,	}	Defendants.

[Filed Sept. 9, 1975]

**JUDGMENT AFTER DECISION
BY THREE-JUDGE COURT**

This action came on for trial on February 26, 1975 before the Court, the Honorable James R. Browning, United States Circuit Judge for the Ninth Circuit, William G. East, Senior United States District Judge for the District of Oregon, and Samuel Conti, United States District Judge for the Northern District of California, constituting a statutory three-judge District Court by designation of Chief Judge Richard H. Chambers for the Ninth Circuit, dated April 8, 1974, all presiding, and the issues having been duly tried

and a decision pursuant to an opinion which constitutes the Court's findings of fact and conclusions of law, having been rendered,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing by his complaint, that the rights of the plaintiff are declared in accordance with the opinion of the Court, that the action of the plaintiff is otherwise dismissed on the merits and that the defendants recover their costs therein.

Dated: September 9, 1975.

James R. Browning
United States Circuit Judge
William G. East
United States District Judge
Samuel Conti
United States District Judge

Appendix C

United States District Court for the
Northern District of California

NO. C-74-0487 SC

James S. Graham,	}	Plaintiff,
vs.		
March Fong Eu, Secretary of State, and Republican State Central Com- mittee of California,		Defendants.

[Filed Sept. 26, 1975]

**NOTICE OF APPEAL TO THE
UNITED STATES SUPREME COURT**

*To: The Clerk of the above entitled court, all parties
and their attorneys of record herein:*

Please Take Notice That pursuant to the provisions of 28 U.S.C. § 1253 Plaintiff James S. Graham hereby appeals to the Supreme Court of the United States from the final order and judgment dismissing the Complaint entered in this action on July 28, 1975. This notice is filed as required by 28 U.S.C. § 2101(b).

Dated: September 22, 1975.

By /s/ James S. Graham
James S. Graham
Attorney and Plaintiff

AFFIDAVIT OF SERVICE BY MAIL

State of California
County of San Mateo—ss.

Carole Jackson, being first duly sworn, on oath, deposes and states:

I am over 18 years of age, and not a party to the within cause; my business address is 1045 Alameda de las Pulgas, Belmont, California 94002. I served a true copy of the attached Notice of Appeal to the Supreme Court of the United States on each of the Counsel of Record for each party in that proceeding by placing the same in an envelope addressed as follows:

Charlton G. Holland, Esq.
Office of the Attorney General
6000 State Building
San Francisco, California 94102

Joseph A. Darrell, Esq.
Thelen, Marrin, Johnson & Bridges
2 Embarcadero Center
San Francisco, California 94111

Each said envelope was then on September 22, 1975, sealed and deposited in the United States mail at Belmont, California, with the first class postage thereon fully prepaid, as required by Rule 33, Rules of the U.S. Supreme Court.

/s/ Carole Jackson
Carole Jackson

Subscribed and sworn to before me
this 22nd day of September, 1975.

(Seal)

Robert S. Odell, Jr.
Notary Public for the County of
San Mateo and the State of California